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Attorneys for Plaintiff  
DEL MAR SEAFOODS, INC.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

DEL MAR SEAFOODS, INC.

Plaintiff,

vs.

BARRY COHEN, CHRIS COHEN (aka  
CHRISTENE COHEN), *in personam* and  
F/V POINT LOMA, Official Number  
515298, a 1968 steel-hulled, 126-gross ton,  
70.8- foot long fishing vessel, her engines,  
tackle, furniture, apparel, etc., *in rem*, and  
Does 1-10,

Defendants.

Case No.: CV 07-02952 WHA

**REQUEST FOR JUDICIAL NOTICE  
IN SUPPORT OF PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT OR, ALTERNATIVELY,  
PARTIAL SUMMARY JUDGMENT**

Date: April 3, 2008  
Time: 8:00 a.m.  
Place: Courtroom 9, 19th Floor  
Hon. William H. Alsup

And Related Counterclaims

Plaintiff Del Mar Seafoods, Inc., by and through its attorneys, hereby requests the

Court to take judicial notice pursuant to Federal Rule of Evidence 201 of the following facts:

///

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DelMarSeafoods/2504

1           1.       Defendant Barry Cohen was a plaintiff in a prior civil case commenced in San  
2 Luis Obispo County Superior Court entitled *Barry A. Cohen; Leonard A. Cohen; Olde Port*  
3 *Inn, Inc; and Olde Port Fisheries, Inc. v. Port San Luis Harbor District*, Case No. CV  
4 040897.

5           2.       In that case on November 16, 2005 Defendant Barry Cohen swore a  
6 declaration under oath that losing his motion for attorneys fees "may actually cause me to be  
7 forced out of business and into bankruptcy . . ." (pg. 11, lines 5-6). A true and correct copy  
8 of Cohen's declaration is attached as **Exhibit 1**.

9           3.       In that case on March 16, 2007 the San Luis Obispo County Superior Court  
10 issued a Ruling denying attorneys fees to both sides. A true and correct copy is attached as  
11 **Exhibit 2**.

12  
13 Dated: February 28, 2008

COX, WOOTTON, GRIFFIN,  
HANSEN & POULOS, LLP  
Attorneys for Plaintiff  
DEL MAR SEAFOODS, INC.

14  
15  
16  
17 By: \_\_\_\_\_

Max L. Kelley

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28 DelMarSeafoods/2504

# EXHIBIT 1

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MILLER STARR

0014

**FILED**

JAN 22 2007

SAN LUIS OBISPO SUPERIOR COURT  
BY Nancy G. Gudino  
N. Gudino, Deputy Clerk

1 GEORGE B. SPEIR (Bar No. 78276)  
 2 ARTHUR F. COON (Bar No. 124206)  
 3 CAROLYN E. NELSON (Bar No. 238526)  
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6 Attorneys for Plaintiffs  
 7 BARRY A. COHEN, LEONARD A. COHEN,  
 8 OLDE PORT INN, INC., and OLDE PORT  
 9 FISHERIES, INC.

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 11 COUNTY OF SAN LUIS OBISPO

12 BARRY A. COHEN; LEONARD A.  
 13 COHEN; OLDE PORT INN, INC.; and  
 14 OLDE PORT FISHERIES, INC.,

15 Plaintiffs,

16 v.

17 PORT SAN LUIS HARBOR THE  
 18 DISTRICT; and DOES 1 to 50, inclusive,

19 Defendants.

20 AND RELATED CROSS-ACTION.

Case No. CV 040897

DECLARATION OF BARRY COHEN IN  
 SUPPORT OF PLAINTIFFS' MOTION FOR  
 ATTORNEYS' FEES

Date: February 21, 2007  
 Time: 9:00 a.m.  
 Judge: Hon. Barry T. LaBarbera  
 Location: 801 Grand Avenue  
 San Luis Obispo, CA

Complaint Filed: October 22, 2004  
 Trial Date: May 8, 2006

21 I, Barry Cohen, declare:

22 1. I am an individual currently residing in Aptos, Santa Cruz County,  
 23 California. I am a plaintiff in this lawsuit and an owner of plaintiff Olde Port Fisheries, Inc.  
 24 ("OPF"). The facts stated in this declaration are true as of my own personal knowledge, and if  
 25 called as a witness I could and would testify competently to those facts.

26 2. I am a fisherman and have been for most of my adult life. I built the Olde  
 27 Port Inn restaurant and OPF facilities on the Harford Pier (the "Pier") starting in approximately  
 28

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DECL. OF BARRY COHEN IN SUPPORT OF MOTION FOR ATTORNEYS' FEES

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MILLER STARR

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1 1964, I had operated a wholesale/processing fish busi on the Pier for over 40 years, until the  
2 actions of Defendant Port San Luis Harbor District ("the District") in mid-to-late 2004  
3 drastically and fatally prevented me from operating my business on the Pier. Without the  
4 necessary, reasonable truck access, I was virtually "kicked off the Pier." These actions of the  
5 District, among others, breached the settlement and lease agreements I made over ten years ago  
6 with the District and resulted in the filing of this lawsuit.

7 3. The District has been found by the jury and the Court to have breached  
8 several contracts it has with me and the other plaintiffs. The 1994 Lease that the District  
9 breached was required by and incorporates the 1993 Settlement Agreement. The 1993  
10 Settlement Agreement and 1994 Lease embody the settlement of my previous lawsuit against the  
11 District in the early-1990s. That lawsuit concerned the District's plan to demolish the historic  
12 warehouse canopy on the terminus of the Pier. This historic structure serves as the supporting  
13 structure for the OPI restaurant and OPF buildings, as well as the restaurant roof.

14 4. I hired the law firm of Miller Starr Regalia ("MSR") to represent me in  
15 that lawsuit. Before hiring MSR, I sought the advice of my local counsel. Richard Carsel, my  
16 attorney in the San Luis Obispo area, informed me that I would need an attorney with special  
17 experience with CEQA issues. He suggested MSR, which then had offices in Oakland and  
18 Walnut Creek, California. Following Mr. Carsel's recommendation, I met with George Speir  
19 and Arthur F. Coon of MSR, and I hired MSR because they seemed most qualified to handle my  
20 case and there were no comparable alternative firms in the San Luis Obispo area that I knew of  
21 to handle issues of this nature, complexity and importance.

22 5. MSR instituted litigation on my behalf in which I was successful in  
23 obtaining a preliminary injunction against the District's threatened unlawful demolition of the  
24 canopy. After substantial additional litigation, but before trial and as an alternative to continuing  
25 that lawsuit, the District and I made an agreement that I would dismiss the lawsuit in return for  
26 the District's agreement to, among other things, the following material conditions:

27 a. The District would not demolish the canopy;  
28

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DECL. OF BARRY COHEN IN SUPPORT OF MOTION FOR ATTORNEYS' FEES

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MILLER STARR

016

1 b. The District would perform certain duties, such as enforcement of  
2 parking regulations on the Pier, repair and maintenance of the Pier, etc.;

3 c. The District would grant certain rights to me, my businesses and  
4 my customers, such as guaranteed fish semi-truck access, a specific minimum number of public  
5 parking spaces on the Pier, and non-exclusive parking rights on all other the District property;  
6 and

7 d. The District would construct an additional building, and the  
8 District and I would enter into a lease for the additional site and building on certain terms and for  
9 which I would pay fair rent.

10 6. In return for a dismissal of the lawsuit, the District agreed to these  
11 conditions and we memorialized them in the 1993 Settlement Agreement, and later the 1994  
12 Lease. Accordingly, I dismissed the lawsuit. However, the District has now breached the  
13 material terms and conditions of our settlement contained in both the 1993 Settlement  
14 Agreement and the 1994 Lease.

15 7. I fulfilled my obligation to the District by dismissing the lawsuit in 1993.  
16 On the other hand the District, after receiving the benefits of this dismissal, chose not to fulfill its  
17 obligation to honor the terms and conditions of our underlying settlement agreement, namely, the  
18 terms and conditions of the 1993 Settlement Agreement and the 1994 Lease.

19 8. As a result of my initial lawsuit against the District, I first considered the  
20 issue of an attorneys' fees clause because the 1976 Lease did not have one. I had to pay my  
21 attorneys' fees out-of-pocket even though I did nothing to bring about the circumstances giving  
22 rise to the District's illegal decision to demolish the canopy. I decided I had to protect myself in  
23 the event that the District might again take unlawful action and/or breach some aspect of the  
24 1976 Lease and/or the settlement agreement. An attorneys' fees clause, I hoped and believed,  
25 would act as a deterrent and afford me some protection. If the District still persisted and  
26 deprived me of my legal rights, and if I prevailed in a legal and/or equitable action, then the  
27 District would be held accountable and responsible to pay my expenses, costs and attorneys'  
28

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DECL. OF BARRY COHEN IN SUPPORT OF MOTION FOR ATTORNEYS' FEES

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017

1 fees. This is exactly what the District agreed to do on page 14 of the 1993 Settlement

2 Agreement, at paragraph 11 ("Attorneys' Fees")

3 If any litigation be commenced between the parties hereto concerning this  
4 agreement or the rights and duties of either Cohen or The District hereunder,  
5 whether it be an action for damages, equitable or declaratory relief, the prevailing  
6 party in such litigation, in addition to such other relief as may be granted by the  
7 court, shall be entitled to recover from the other party reasonable expenses,  
8 attorneys' fees and costs.

9 9. The District agreed to have "Attorneys' Fees" clauses in the 1993  
10 Settlement Agreement and the 1994 Lease, and to "tie" an attorneys' fees clause to the 1976  
11 Lease. The "tie" for attorneys' fees to the 1976 Lease comes from the 1993 Settlement  
12 Agreement, page 16, paragraph, 15 ("Good Faith"): "The parties acknowledge and agree that  
13 each party hereto has an obligation of good faith and fair dealing, to conduct himself or itself in  
14 such a fashion so as not to deprive any other party of the benefits to be derived from this  
15 Agreement or from the Lease." (Italics added.) The "Lease" referred to was defined in the 1993  
16 Settlement Agreement on page 1 in the recitals: "WHEREAS, Cohen and The District are  
17 parties to a lease agreement dated January 1, 1976 ('Lease'), pursuant to which Cohen leases  
18 certain property from the District." So a violation of the 1976 Lease is also a violation of the  
19 "Good Faith" clause of the 1993 Settlement Agreement, which includes an attorneys' fees  
20 clause.

21 10. Although over the years the District did not live up to all of its continuing  
22 contract obligations, as shown by its lack of parking enforcement, allowance of exclusive RV  
23 parking, failure to maintain the Pier, etc., I did not take any legal action against the District. I  
24 complained to the District about its failures to uphold its end of the agreements, but I did not  
25 want another legal battle with the District. A lawsuit would be my absolute last recourse.

26 11. When it became clear that the District's threat of breaches regarding  
27 guaranteed truck access and parking were real and imminent, my son, Leonard, and I, again  
28 following Richard Carsel's advice, retained MSR to try to resolve the dispute. We retained the  
firm again because of its affiliation with the prior lawsuit, and its qualifications, capability, and  
familiarity with the facts and issues. MSR was uniquely acquainted with the parties and

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018

1 contracts at issue, as it had handled the prior litigation and participated in negotiating and  
2 drafting the 1993 Settlement Agreement and 1994 Lease. No local firm shared this familiarity  
3 with the issues, parties, documents and evidence, and we felt MSR was really our only wise  
4 choice.

5 12. Unfortunately, at the June 2004 the District Commissioners' Meeting, the  
6 District took action that I could not live with. The District reconfigured the parking areas on the  
7 Pier terminus in such a manner as to deprive me of the settlement agreement's guaranteed  
8 twenty, but in no event less than seventeen, public parking spaces. I was also deprived of the  
9 reasonable fish truck access guaranteed by the 1994 Lease. Either way, at any given time, I  
10 could only have one or the other, but not both.

11 13. At that meeting I pleaded with the District's Commissioners to reconsider.  
12 I explained that the action the District was about to take would be in direct violation of our 1993  
13 Settlement Agreement and our 1994 Lease. I reminded Commissioner Carolyn Moffat that she  
14 was the Commissioner who signed the 1993 Settlement Agreement on behalf of the District. I  
15 explained there were other viable options that would accomplish the same goals the District said  
16 it wanted to achieve -- primarily an open 18-foot fire lane the length of the Pier -- without  
17 violating the agreements the District had with me. Commissioner Moffat said she was sorry that  
18 this would hurt our customers, and in turn hurt me, but she voted for the new parking  
19 configuration anyway. All but one of the Commissioners voted in favor of the new  
20 configuration, without even looking at the 1993 Settlement Agreement or the 1994 Lease, even  
21 though copies of the agreements were available in the same building as the meeting. The  
22 Commissioners apparently did not care enough about their obligations to even review the  
23 agreements to confirm what their obligations were under those agreements, prior to voting on an  
24 action that would clearly breach them.

25 14. Still, I wanted to avoid any legal action if at all possible. I had Arthur  
26 Coon, our attorney from MSR, come to the next meeting of the Harbor The District Commission  
27 to speak with the Commissioners in an effort to avoid any legal action. He explained in detail  
28 how the District could comply with its contracts with the Cohens and its own Master Plan and

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MILLER STARR

010

1 Coastal Act obligations in a way that would be a "win-win." The Commissioners simply  
2 thanked Mr. Coon for his concerns and moved on to the next agenda item without further  
3 comment or acknowledgement. Nothing changed. Next, my son Leonard and I offered the  
4 District up to a \$20,000 loan to help cover the cost to use another parking/truck access option  
5 that both the District and I could live with. The District rejected the offer, which was formally  
6 made in a July 2, 2004, letter to the District. We tried to meet with CDF to explain and resolve  
7 the problem, but CDF, which is the District's designated fire protection agent, would only meet  
8 with the District. I tried very hard to find a compromise that would avoid litigation, but the  
9 District would not budge one inch off their position. It did not even try to honor its contracts.

10 15. Eventually, the District started placing "warning" tickets on "illegally"  
11 stopped vehicles (mostly the semi fish trucks). Finally, the District had the CDF Fire Marshall  
12 issue an actual citation to a semi fish truck. Once that happened, I had no choice but to seek  
13 legal redress. I notified Art Coon who filed a complaint. We attempted mediation with Judge  
14 Conklin, and CDF's Mike Harkness even attended a session at the Judge's request to see if a  
15 solution to the pier configuration problem could be reached, but the District would still not agree  
16 to honor its contract obligations.

17 16. The District put me in an impossible position that left me no choices or  
18 options. I did nothing to provoke this lawsuit and in fact made great efforts to avoid it. In spite  
19 of my repeated pleas, the leases, the settlement agreement, our attorney's public explanation to  
20 the Commissioners, and our monetary offer, the District knowingly chose to breach its  
21 settlement agreement. If I wanted to maintain and protect my bargained-for rights, then I was  
22 forced to seek this Court's assistance.

23 17. Since the District chose to deprive me of the full advantage of the leases  
24 and settlement agreement and drove my wholesale fish processing operation out of business, I  
25 stopped paying rent under the 1994 Lease and wanted to renegotiate a new "fair" rental value for  
26 the 1994 Lease. But the District chose, instead, to send me a 15-day "notice of eviction" to evict  
27 me for nonpayment of rent. I responded in good faith by tendering a \$6,000 adjusted rent check  
28 with an explanation that this was a good faith effort toward payment of a reasonably reduced

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MILLER STARR

020

1 rent. If the District and I could not agree on what a "fair" rent should be, as required in the 1993  
2 Settlement Agreement, I felt that the only option was to make a good faith tender and let a court  
3 of law make the decision as to the fair amount for us given the District's material breaches of our  
4 Settlement Agreement.

5 18. The District rejected my good faith offer, returned the check and notified  
6 me that only the full rent amount would be acceptable. The District then sued me in a cross-  
7 complaint, asking for full rent and seeking to evict me for not paying such rent. My position,  
8 going into court, remained the same. I should pay whatever the judge or jury decided to be a fair  
9 reduced rent for the premises due to the District's breach of the leases and settlement agreement.  
10 For its part, the District went into court asking for full rent only, plus late fees and interest, and  
11 my eviction from the premises.

12 19. I am a prevailing party in this action because I received the "greater relief"  
13 on the contract claims. From the beginning of this dispute, when the District announced its  
14 intention to implement the interim shared-use plan, my main objective was to stop the District's  
15 breaches and force the District to comply with its settlement agreement obligations. To try to  
16 achieve this objective, my attorney drafted a public entity claim letter demanding that the  
17 District "do whatever needs to be done to comply with its legal obligations." When it became  
18 clear that the District would not comply with its obligations, my attorney filed a Complaint  
19 seeking to remedy the District's stubborn refusal to honor its agreements to provide the required  
20 public parking and truck access, and to adequately repair and maintain the Pier. Throughout the  
21 litigation, my primary concern remained the District's breaches of the contracts at issue, i.e., the  
22 settlement agreement. After more than 2 years of litigation during which the District refused to  
23 acknowledge its breaches or offer to perform, I finally achieved my goal of proving those  
24 breaches and compelling the District to comply with its obligations when the Court issued its  
25 Statement of Decision and entered Judgment granting me \$50,000 in past damages (as awarded  
26 by the jury) and significant equitable relief, and setting a fair reduced rent. The declaratory  
27 judgment and specific performance decree granted me substantially all redress I sought to  
28 achieve by this law suit.

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DECL. OF BARRY COHEN IN SUPPORT OF MOTION FOR ATTORNEYS' FEES

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MILLER STARR

0021

20. In addition to achieving my primary litigation objectives, this relief far outweighs any relief granted to the District. From the outset, the District's contentions have been that it did breach the contracts and did not have to comply with what we contended were its obligations under the contracts. The District also made a claim against me for indemnity, ejectment, and full back rent under the agreements. The Court's Judgment—which found that the District had and breached contract obligations to the plaintiffs, that the District must comply with those obligations, that I need not indemnify the District, that the District's claim for ejectment was rejected, and that I owe only partial back rent because of the District's breaches—is therefore a complete failure for the District. It was not the District's primary litigation objective to be declared and found liable for breach of all the contracts, to pay my damages, to be forced to reduce my rent to half and allow me to remain in possession of the premises, and to be ordered to permit parking truck access, remove RV's from Harford landing and require the pier walkway as we had requested. While the Court ordered that I pay the District \$44,808.98 in back rent on the cross-complaint, *this actually represented a success for me on Defendant's breach of contract claim.* The new "fair" amount of "back rent due" awarded to the District was actually a net loss to the District of one-half of the original "fair" amount of "rent due" under the 1994 Lease (before the District's breach). Therefore, the District suffered a net loss of rent income under the 1994 Lease by one-half of the rent otherwise due because of their breach of the 1994 Lease. Moreover, the District will suffer further loss of rent income under the 1994 Lease by one-half until they comply with the 1993 Settlement Agreement and the 1994 Lease, which again, will be a monetary gain to me. The amount awarded by the Court to the District was less than my \$50,000 damages award, and less than half of what the District demanded and excludes late fees. Essentially, the Court found that I was substantially justified in not paying rent due to the District's material breaches, ruling in favor of my request for an adjusted "fair" rent and at the same time verifying that the District was in breach of the leases and settlement agreement and could not expect payment of full rent, just like I had said. At the outset, I had offered partial rent — which the District rejected, insisting on full rent — so this partial rent award is no victory at all for the District. When the District's minimal, partial relief, and failure to achieve its primary

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DECL. OF BARRY COHEN IN SUPPORT OF MOTION FOR ATTORNEYS' FEES

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MILLER STARR

0022

1 litigation objectives, is compared with my substantial equitable and monetary awards, and  
2 achievement of our primary litigation objectives, it is clear that we obtained the greater relief in  
3 this action.

4 21. The District never made any sincere effort to reach an agreement with me  
5 or any of us to settle our dispute or this lawsuit. It is also a fact that the District, at its sole  
6 discretion, could have corrected and cured its breaches and fulfilled its obligations at any time,  
7 before the trial, during the trial and now. The District is the only one, between us, that has the  
8 authority and ability to make things right. However, the District has chosen not to do so.

9 22. I believe, and with good cause, that one of the District's strategies was to  
10 spend its insurance company's money to multiply and expand this litigation so as to force  
11 Leonard and I to expend all their personal resources until none were left and the District could  
12 win by default. Why else would such a basic decision-making process over parking, truck  
13 access and a fire lane be turned into a multi-million dollar lawsuit, especially when there were  
14 attorneys' fees clauses benefiting the prevailing party who obtained either damages or equitable  
15 relief? At this point, this lawsuit has cost me so much in time, money and personal hardship,  
16 that even if I were awarded all of the expenses, costs and attorneys' fees, it would still take me  
17 years, if ever, to be made whole. I have been forced to take out loans on and finally to put my  
18 house up for sale to finance this lawsuit in an effort to enforce the contracts with the District. I  
19 ask the Court to consider the overall fairness and justice of the outcome of the jury trial and the  
20 Court's rulings on plaintiffs' equitable claims. With their eyes wide open, the District  
21 knowingly and in bad faith has purposely deprived me, my son and our family businesses of the  
22 material benefits under their current agreements with me, which they promised me in 1993, if I  
23 would dismiss the lawsuit against them.

24 I find it ludicrous that the District would even think to ask this Court or me for  
25 anything other than forgiveness. Again, the District, with their eyes open, knowingly and in bad  
26 faith "broke" their word to me. They "breached" all our leases between us. They violated the  
27 1993 Settlement Agreement after they enjoyed a dismissal of the previous lawsuit. They deprived  
28 Leonard and I of our Lease rights. They have hurt and are still hurting our businesses and even

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MILLER STARR

023

1 "ran" the major commercial fishing activities (which is in violation of the California Coastal Act)  
2 out of the Harbor. They let the Pier deteriorate and fall into neglect. They knowingly allowed our  
3 customers to get hurt walking the Pier because of their neglect. They displaced our customer's  
4 parking spaces with RVs. They used "scorched earth" tactics during this lawsuit to drain all of our  
5 resources. They attacked Leonard and I personally. They invaded our privacy. They knowingly  
6 lied about me. They were found by the judge and jury to have "breached" our leases and  
7 Settlement Agreement, yet they continue on. Threatening me with an appeal of this Court's  
8 decision, I know now without a doubt their motives and actions. They feel no remorse for acting  
9 like a bully throughout this litigation, forcing us to trial, forcing us to establish liability and  
10 breaches, but still failing to comply with this Court's order. Even today, they still have not made  
11 any effort to do the "right thing."

12 The District has acted in bad faith with me and now with this Court. also In my  
13 opinion the District has not made a sincere effort to comply with this Court's orders. The District  
14 has tried again and again to mislead this Court. Today they stand in defiance of this Court's  
15 orders. The District seems to think they are above the law, but that is not how I understand  
16 the legal system to work. I have also personally watched and listened to them mislead and be less  
17 than truthful to the Coastal Commission.

18 It is incredible that they have the temerity to come into this Court, claiming to be  
19 the prevailing party. They are also asking this same Court. that they defy, to order Leonard and I  
20 to pay their costs and their attorneys' fees, even though they acted in such bad faith and caused  
21 such harm. Have these people absolutely no conscience at all? Here are the facts: These are the  
22 people that promised in 1993 to pay our reasonable expenses, attorneys' fees, and costs if  
23 they acted in such a fashion as to deprive us of the benefits of our leases and settlement  
24 agreement. Well, here we are today and that's exactly what they did: "deprive us of the benefits  
25 of our leases and settlement agreement," with their eyes wide open. I am astonished that the  
26 District can stand before you and with a straight face say they deserve anything other than  
27 punishment for their behavior, acting as if they did nothing wrong, caught "red  
28 handed," and yet not be embarrassed for their defiance of this Court's orders, for their disregard of

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DECL OF BARRY COHEN IN SUPPORT OF MOTION FOR ATTORNEYS' FEES

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MILLER STARR

0024

1 other's rights, and their total lack of good faith and fair dealing. The District badly hurt my son  
2 and I, our families, and our businesses.

3 In my humble opinion, it would not be fair to my son and I if we were denied  
4 an award of expenses, attorneys' fees, and costs. After all, that is what the District promised us in  
5 1993. Denial of our total lawsuit expenses may actually cause me to be forced out of business  
6 totally and into bankruptcy, only because I stood up for my clear legal rights when they were  
7 being knowingly and intentionally violated by the District.

8 23. In summary:

9 a. The District made an agreement with me in 1993, from which they  
10 have already enjoyed the benefits and are now depriving me of my benefits.

11 b. The District was found by the judge and the jury to have breached  
12 our leases and settlement agreement.

13 c. The District agreed to an "Expenses, Attorneys' Fees, and Costs"  
14 clause as part of our 1993 Settlement Agreement.

15 d. The District agreed to a "Good Faith" provision in our 1993  
16 Settlement Agreement.

17 e. The District voted to hurt our businesses before even reviewing our  
18 agreements.

19 f. We offered The District up to a \$20,000 loan to help fund a  
20 mutually agreeable option.

21 g. The District made this lawsuit as expensive as they possibly could to  
22 "clean us out," hoping to "win" by default.

23 (i) The District used insurance money to finance this litigation.  
24 (ii) We used our money to enforce our rights and stand up to The  
District's tactics.

25 h. The District has not complied with the judge's order.

26 i. The District did not use "good faith" and "fair dealings" in their  
27 agreements with me.  
28

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DECL. OF BARRY COMEN IN SUPPORT OF MOTION FOR ATTORNEYS' FEES

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MILLER STARR

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1 j. We had to pay and owe over two million dollars just to protect our  
2 rights from the same people that "gave" them to us.

3 k. We did all we could to avoid this lawsuit, but the District was the  
4 one that had the "power" to make things right. They chose not to avoid the lawsuit.

5 24. For all the reasons previously stated, and the Court's orders and the jury's  
6 findings, I ask the Court to find me and the other plaintiffs to be the "prevailing parties" who  
7 obtained the greater relief under the contracts. Furthermore, I ask the Court to enforce these  
8 contracts by ordering the District to pay all of our reasonable expenses, all of our costs, and all of  
9 our attorneys' fees, as the District, in 1993, agreed that it would do, under these exact  
10 circumstances, in exchange for me dismissing my worthy lawsuit against the District.  
11 Furthermore, I ask for any other award this Court deems appropriate.

12 I declare under penalty of perjury under the laws of the State of California that the  
13 foregoing is true and correct. Executed this \_\_\_\_\_ day of January, 2007, at Aptos, California.

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BARRY A. COHEN  
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DECL. OF BARRY COHEN IN SUPPORT OF MOTION FOR ATTORNEYS' FEES

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MILLER STARR


0026

1 j. We had to pay and owe over two million dollars just to protect our  
2 rights from the same people that "gave" them to us.

3 k. We did all we could to avoid this lawsuit, but the District was the  
4 one that had the "power" to make things right. They chose not to avoid the lawsuit.

5 24. For all the reasons previously stated, and the Court's orders and the jury's  
6 findings, I ask the Court to find me and the other plaintiffs to be the "prevailing parties" who  
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10 circumstances, in exchange for me dismissing my worthy lawsuit against the District.  
11 Furthermore, I ask for any other award this Court deems appropriate.

12 I declare under penalty of perjury under the laws of the State of California that the  
13 foregoing is true and correct. Executed this 21<sup>st</sup> day of January, 2007, at Aptos, California.

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16 BARRY A. COHEN  
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DECL. OF BARRY COHEN IN SUPPORT OF MOTION FOR ATTORNEYS' FEES

01/22/2007 11:13 FAX 925 933 4126

MILLER STARR

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**PROOF OF SERVICE***(Barry A. Cohen, et al. v. Port San Luis Harbor District  
San Luis Obispo Superior Court, Case No. CV 040897)*

I, Karen Irias, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 1331 N. California Blvd., Fifth Floor, Post Office Box 8177, Walnut Creek, CA 94596. On January 22, 2007, I served the within documents;

**DECLARATION OF BARRY COHEN IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES**

- ☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- ☐ by transmitting via electronic e-mail, to the following e-mail addresses indicated below on this date before 5:00 p.m.
- ☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Walnut Creek, California addressed as set forth below.
- ☐ by placing the document(s) listed above in a sealed \_\_\_\_\_ envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a \_\_\_\_\_ agent for delivery.
- ☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

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Avila Beach, CA 93424

Co-Counsel for Defendant and Cross-Complainant **PORT SAN LUIS HARBOR DISTRICT**

Attorneys for Defendant and Cross-Complainant **PORT SAN LUIS HARBOR DISTRICT**

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DECL. OF BARRY COHEN IN SUPPORT OF MOTION FOR ATTORNEYS' FEES

01/22/2007 11:13 FAX 925 933 4126

MILLER STARR

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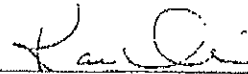
Courtesy Copy:

Hon. Barry T. LaBarbera  
San Luis Obispo Superior Court  
Department 2  
1035 Palm St., 3rd Fl.  
San Luis Obispo, CA 93408  
e-mail:  
[Barry.LaBarbera@slo.courts.ca.gov](mailto:Barry.LaBarbera@slo.courts.ca.gov)

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 22, 2007, at Walnut Creek, California.



Karen Irias

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-14-

DECL. OF BARRY COHEN IN SUPPORT OF MOTION FOR ATTORNEYS' FEES

# **EXHIBIT 2**

**FILED**  
**SAN LUIS OBISPO**  
**SUPERIOR COURT**

**MAR 16 2007**

COURT EXCLUSIVE CLERK

DEPUTY CLERK

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SAN LUIS OBISPO

BARRY A. COHEN; LEONARD A.  
COHEN; OLDE PORT INN, INC., and  
OLDE PORT FISHERIES, INC.,

Plaintiffs,

v.

PORT SAN LUIS HARBOR DISTRICT;  
and DOES 1-50, inclusive,

Defendants.

AND RELATED CROSS-ACTION

Case No.: CV040897

RULING ON THE PARTIES' MOTIONS  
FOR ATTORNEYS' FEES AND COSTS  
AND THE RESPECTIVE PARTIES'  
MOTIONS TO TAX COSTS (AND  
PLAINTIFFS' MOTION TO STRIKE  
DISTRICT'S MEMORANDUM OF  
COSTS)

Defendants request that the court take judicial notice of certain trial court rulings and declarations of counsel filed in other local cases. The requests are denied because such documents are not relevant to the court's decision on the pending matters. Both parties object to certain declarations of counsel and various parties or other persons. Those objections are sustained as those declarations are not relevant to the issues presented herein.

The threshold question presented is whether any party actually prevailed in this lawsuit. As they did throughout the pendency of this case, both sides vigorously

1 contend directly opposite positions.

2 At the outset, Plaintiffs contend that, at least, Barry Cohen should be awarded  
3 costs as the prevailing party because he obtained a net monetary award. (*Pirkig v.*  
4 *Dennis* (1989) 215 Cal.App.3<sup>rd</sup> 1560, 1566). The Plaintiffs' position is simply not  
5 supported by the judgment. It is clear that Barry Cohen was awarded \$50,000 but the  
6 Defendant also was awarded approximately \$45,000 in back rent and additional money  
7 in future rents. Barry Cohen argues that he should be credited with the court-imposed  
8 fifty percent rent reduction as a part of his successful litigation. In order to recognize  
9 such an argument, the court would have to ignore the actual dollars encompassed in the  
10 judgment which by its terms includes future rent to the date of the lease termination.  
11 This case was not a clear victory in this respect for Barry Cohen such that the asserted  
12 net \$5,000 recovery would require his designation as the prevailing party on the 1994  
13 lease. Moreover, Plaintiffs' contention in this regard only relates to costs (CCP §1032)  
14 and not to attorneys' fees (CCP §1717). Plaintiffs cite no authority to support this  
15 contention in the context of attorneys' fees. On the other hand, Defendant argues that it  
16 prevailed in this cause against Barry Cohen because the court awarded some back and  
17 future rent. However, the court also denied Defendant's ejectment claim which would  
18 have terminated the lease, certainly a goal of Defendant. Thus the court finds no  
19 prevailing party on the causes which related to the 1994 lease.

20 The parties' arguments on the remaining causes again claim victory for each.  
21 The court has reviewed the complaint as a starting point. (*Hru v. Abbata* (1995) 9  
22 Cal.4<sup>th</sup> 863, 876) Defendant is correct that the complaint is drawn largely to request a  
23 prayer for money damages. Defendant is also correct that while equity causes and  
24 prayers were included, they did not comprise a significant portion of the allegations.  
25 Further, Defendant is correct that Plaintiffs never requested early rulings on the equity  
26 causes either by pretrial motion or by requests to proceed in equity at trial before the  
27 legal causes for damages. Last, Defendant is correct that Defendant prevailed on all the  
28 legal claims except one. The court has reviewed the pleadings upon motion practice,

1 the excerpts of various opening statements and arguments, and the parties' settlement  
2 conference briefs. (Ibid.)

3 Plaintiffs' settlement brief does not support their contention that they were  
4 successful on the legal claims in any respect, even as to Barry Cohen. The court could  
5 certainly attempt to address each of the legal causes and prepare findings as to each  
6 beyond those contained in the Statement of Decision and Judgment. The court declines  
7 to do so. The court finds that Defendant prevailed on the legal claims.

8 However, the court recognizes that the jury and the court found that Defendant  
9 breached every contract. It is for that reason that the court was unwilling to simply  
10 allow Defendant to continue the breaches with impunity. The court made a concerted  
11 attempt to separate those breaches which could be rectified through equity from those  
12 breaches upon which Plaintiffs' proof failed or upon which fairness would not allow  
13 equity, such as the pier repairs assertions made by Plaintiffs.

14 Defendant argues that the equity causes wherein Plaintiff's prevailed were minor  
15 matters. However, Plaintiffs are correct that Plaintiff's settlement agreement and their  
16 attempts prior to the lawsuit to secure Defendant's cooperation at least with parking  
17 availability, truck stoppage, and pedestrian safety indicates that these obligations were a  
18 goal Plaintiffs sought to achieve for years. They sought damages eventually, but it is  
19 not tenable to minimize the importance to all Plaintiffs of these failures by Defendants.  
20 Defendant continues to argue that the parking spaces are and have been provided.  
21 Defendant continues to ignore the jury and court findings to the contrary. Defendant  
22 continues to this day to assert that it did not breach its specifically delineated obligation  
23 to allow pier access for trucks which was critical to Plaintiffs' fish business. It is clear  
24 to this court that if Defendant complies with the court's order in equity, Plaintiffs would  
25 be able to operate their businesses in the manner contemplated by the parties to the  
26 contract: the goal was to maximize business profits so both parties would achieve the  
27 maximum benefits from the contracts. Plaintiffs were successful on their equity claims.  
28 The claims on the 1998 lease were denied as unnecessary to achieve a fair result. The

1 equity claims on the pier repairs were denied because Plaintiffs failed to prove that the  
2 pier was unable to support the trucks. In addition the pier repair claims would not have  
3 directly benefited Plaintiffs even if ordered. Defendant never attempted to prove that  
4 the pier could not support the fish trucks and Plaintiffs never proved that the pier  
5 actually needed repairs in order to allow Plaintiffs to operate their businesses (except  
6 the walkway). The Defendant's equity successes were certainly not part of its litigation  
7 objectives. The lack of declaratory relief in some respects and the lack of an order for  
8 specific performance of repairs has never been a goal of the Defendant. The court did  
9 not order any injunctions for reasons which had little, if anything, to do with the  
10 Defendant's arguments or evidence or any other presentation.

11 Although the court had little trouble discerning that Plaintiffs were not  
12 prevailing parties in any respect, the question of Defendant's status as such was  
13 problematic and turned on the court's assessment of the effects of the equity claims. As  
14 a starting point, Defendant's settlement brief contains a summary of its contentions on  
15 page 4. Of the six contentions, Defendants prevailed on one (except as to Plaintiff  
16 Barry Cohen where a small damage award was ordered). While Defendant continues to  
17 argue that equitable relief should not be available to Plaintiffs, this court ordered such  
18 relief, albeit on a limited basis. In the final analysis, the Defendant did not achieve a  
19 "simple, unqualified win." (Id. at p. 876 citing *Deane Gardenhome Association v.*  
20 *Denktas, et al.* (1993) 13 Cal. App.4<sup>th</sup> 1394, 1398). The contract attorney fees clause in  
21 the settlement agreement, upon which most of the equitable relief was granted, includes  
22 equitable causes of action. The results are mixed. (Ibid.) The court finds that Plaintiffs  
23 prevailed on their equity causes, one legal cause, and on the liability element of each  
24 legal cause. Thus, the court finds that neither side prevailed. (CCP §§1032, 1717; *Scott*  
25 *Co. v. Blount, Inc.* (1999) 20 Cal.4<sup>th</sup> 1103).

26 Defendant served settlement offers on each Plaintiff which is a basis for  
27 Defendant to claim post offer costs. (CCP §998) The offer to Barry Cohen would have  
28 provided zero dollars to him; Barry Cohen received an award. Defendants cannot be

1 awarded costs pursuant to CCP 998 as to Barry Cohen. The offer to Leonard Cohen  
2 would have provided payment to him of \$101,000. Defendant argues that Leonard  
3 Cohen received nothing as a result of his lawsuit. It is true that Leonard Cohen received  
4 zero dollars from the jury. However, Leonard Cohen did receive equity relief from the  
5 court in two respects. First, the court ordered Defendants to actually provide the  
6 parking spaces required by the contracts. While Defendants continue to argue that the  
7 defined spaces provide that parking, the jury and the court disagreed with the contention  
8 because of the truck blockage and the Defendant's failure to effectively and consistently  
9 enforce parking restrictions. Second, the truck stoppage space ordered by the court  
10 would inure to the benefit of Leonard Cohen because parking space availability would  
11 be increased. Plaintiffs and Leonard argue that since the cost to Defendant to perform  
12 their obligations under the equity order would be in excess of the CCP 998 offer to  
13 Leonard Cohen, Leonard achieved a result valued in excess of the offer. Although there  
14 is no direct case authority for that proposition, the court finds Leonard's argument  
15 persuasive. The lawsuit began and ended with a contention by Plaintiffs that parking  
16 and truck access were critical to their expectations under the contracts. They obtained  
17 orders from the court in equity which will require Defendants to perform these  
18 obligations. Defendants have appealed those orders on grounds, inter alia, that  
19 Plaintiffs failed to prove causation and damages so that equity is unavailable. This  
20 court disagreed with Defendant and Leonard did obtain a result which had a value on  
21 the basis of probable costs of repair or construction in excess of the offer to settle.  
22 Defendant is not entitled to costs from Leonard pursuant to CCP 998.

23 Plaintiffs have filed a motion for prejudgment interest. The court has  
24 insufficient information on what money is owed and awaits further information on that  
25 issue. Plaintiffs also filed pleadings regarding an allegation that Defendant has not

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1 performed as ordered by the court. Again, there is insufficient information to rule at  
2 this time. The motions to tax costs and to strike the Defendants Memorandum of Costs  
3 are rendered moot by this ruling.

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5 DATED: March 16 2007

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7 BARRY T. LABARBERA  
8 Judge of the Superior Court  
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SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SAN LUIS OBISPO  
Civil Division

CERTIFICATE OF MAILING

BARRY COHEN

VS.

PORT SAN LUIS

CV040897

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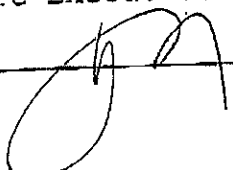
15 West Carrillo Street, Suite 211  
Santa Barbara CA 93101

Under penalty of perjury, I hereby certify that I deposited in the United States mail, at San Luis Obispo, California, first class postage prepaid, in a sealed envelope, a copy of the foregoing addressed to each of the above

OR

If counsel has a pickup box in the Courthouse that a copy was placed in said pickup box this date.

WAYNE HALL, Court Executive Officer

by  Deputy

Dated: 3/14/01